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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1071

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

ELMER DAVIS, REGIONAL DIRECTOR, 16TH REGION, NATIONAL LABOR RELATIONS BOARD,
Respondent,

SOUTHERN CONFERENCE OF TEAMSTERS, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAYNE RATNER
444 North Market
Wichita, Kansas

JOE H. TONAHILL
Tonahill Building
Jasper, Texas

Attorneys for Groendyke Transport, Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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SOUTHERN CONFERENCE OF TEAMSTERS, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled action on January 2, 1969, reversing the judgment of the United States District Court for the Eastern District of Texas,

Beaumont Division, wherein the trial court had entered an interlocutory injunction enjoining the Regional Director of the National Labor Relations Board from instituting enforcement proceedings to obtain the employer's compliance with the Board's *Excelsior* Rule, 156 NLRB 111, as modified by the Board in the course of these proceedings.

CITATIONS TO OPINION BELOW

The opinion of the United States District Court for the Eastern District of Texas is reported in 69 L.R.R.M. 2046, Appendix A, p. A1.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in ..... F.2d ....., 70 L.R.R.M. 2268 and printed in Appendix B, p. A8 herein.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 2, 1969. An Application for Stay of Proceedings was denied by the Circuit Court of Appeals on January 9, 1969, and by this court on January 12, 1969. The jurisdiction of this court is invoked under the provisions of Title 28, U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States District Court had jurisdiction to enjoin the National Labor Relations Board where it was shown that the Board violated an unambiguous mandatory provision of a federal statute in promulgating the Board's *Excelsior* Rule.

2. Whether the Court of Appeals abused its discretion in disposing of this appeal in a summary fashion.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved are Title 5, U.S.C.A. §551, Appendix C, p. A19; Title 5, U.S.C.A. §552, Appendix D, p. A21; Title 5, U.S.C.A. §553, Appendix E, p. A23; Title 29, U.S.C.A. §156, Appendix F, p. A24; Title 29, U.S.C.A. §157, Appendix G, p. A25; Title 29, U.S.C.A. §161(2), Appendix H, p. A25. The Board's applicable regulations are as follows: 29 C.F.R. §101.18, Appendix I, p. A26; 29 C.F.R. §101.19, Appendix J, p. A26.

STATEMENT OF CASE

The United States District Court for the Eastern District of Texas issued an interlocutory injunction enjoining the Regional Director of the National Labor Relations Board from enforcing the Board's *Excelsior* Rule first announced in *Excelsior Underwear, Inc.*, 150 NLRB 1236, and further modified in the course of these proceedings. On appeal by the Board, the United States Court of Appeals for the Fifth Circuit summarily reversed the judgment of the trial court without oral argument or a formal hearing.

The *Excelsior* Rule, which has never been promulgated in the Federal Register and subject to change without notice by the Board, has been summarized generally as follows:

> "The new rule requires an employer to furnish to the Board's Regional Director prior to a representation election, a list of names and addresses of the employees eligible to vote in the election, after which the Regional Director must make the list available to all parties to the proceeding."
>
> *N.L.R.B.* v. *Rohlen*, 385 F.2d 52.

In this particular representation proceeding the rule was expanded and combined with the Board's showing of interest rule as follows:

> "Election eligibility lists, containing the names and addresses of all the eligible voters, must be filed by the employer with the Regional Director for the region within 7 days after the date of the decision and direction of election. The lists may initially be used by the Regional Director to assist in determining an adequate showing of interest. *The Regional Director shall make the lists available to all parties to the election when he shall have determined that an adequate showing of interest among the employees in the units found appropriate has been established.* No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." (Wire order dated June 11, 1968, from the National Labor Relations Board, Company Exhibit "C".)

The company at all times contended that there had not been an adequate showing of interest. (Company Exhibit "F")

In issuing the foregoing order, the Board denied the employer's request for modification of its order to permit the filing of the eligible employees' names and addresses with a distinterested party who would mail union literature to such employees. (Company Exhibit "B")

The company declined to comply with the particular version of the *Excelsior* Rule figuring in this case. The Board then issued a subpoena duces tecum directed to the company Vice-President and Secretary, Robert McKennon, to appear before Elmer Davis, Regional Director, directing him to bring with him corporate records, "in-

cluding, but not limited to, personnel and payroll records as will show the names of all drivers," at certain named company terminals. In lieu of such records, the company was required to furnish a list of names of such employees. As a further alternative the company was directed to make available such information for inspection and copying by a Board Agent.

Thus it was apparent that the Board was intending to schedule an election irrespective of the company's compliance with the particular version of the *Excelsior* Rule figuring in this case. Even if the company had complied with this subpoena, the Board could still have set aside the election if the union lost.

The Board has previously attempted to secure enforcement of a similar subpoena in the course of conducting hearings in this representation proceeding. Such a subpoena was not enforced. See Civil Action No. 67-359, United States District Court for the Western District of Oklahoma entitled *N.L.R.B., et al.* v. *Robert McKennon.* The threat of another proceeding was readily apparent as was the prospect of successive elections.

Further, it is well established that a party is not required to completely exhaust all available administrative remedies when such would be a futile and time-consuming act. *Gully* v. *Interstate Natural Gas Co.*, 82 F.2d 145 (5 Cir. 1936).

In the course of these proceedings, the case of *Wyman-Gordon* v. *NLRB*, 397 F.2d 394, was published, holding the *Excelsior* Rule invalid. The company then concluded to attack the rule directly by filing its complaint for an injunction enjoining the Board from conducting an election pursuant to the Board's special ver-

sion of the *Excelsior* Rule contained in the Board's direction of election contained in this case.

The company filed its complaint for injunction and motion for temporary restraining order, together with supporting exhibits, on June 26, 1968. The Board responded with a motion to dismiss and a motion to dissolve the temporary restraining order. The company's complaint and the Board's motion were heard on July 12, 1968.

On August 1, 1968, the court issued its order enjoining the Regional Director from enforcing or attempting to enforce the *Excelsior* Rule as drafted in this case against the company following the decision in *Wyman-Gordon Co.* v. *N.L.R.B.*, 397 F.2d 394 (1968), cert. granted November 12, 1968, and *Magnesium Casting Company* v. *Hoban,* ..... F.2d ..... (1st Cir., 69 LRRM 2206).

On September 30, 1968, notice of this appeal to the United States Court of Appeals was filed in the District Court.

After docketing the appeal the Board filed a motion for summary reversal. The motion was submitted to the Court of Appeals on October 21, 1968, with the submission of informal briefs. On December 10, 1968, the court directed the employer respond to the supplemental memorandum filed by the Board within five (5) days time. Since, under the regular court rules, the employer's brief on the merits was not due to be filed by that time, leave was requested to file a brief on the merits by December 26, 1968. This request was granted. On January 2, 1969, the Court of Appeals summarily disposed of all issues before the court.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit is directly in conflict with the decision of the United States Court of Appeals for the First Circuit in *Wyman-Gordon* v. *N.L.R.B.*, 397 F.2d 394 (1968), cert. granted November 12, 1968. This conflict was conceded in the court below, Appendix B, p. A8. In the words of Chief Judge Brown:

> "This court took note of the First Circuit's decision and in passing upon the validity of *Excelsior* rejected *Wyman-Gordon*."

ARGUMENT AND AUTHORITIES

I

The District Court Had Jurisdiction to Enjoin the National Labor Relations Board Where It Was Shown That the Board Had Violated an Unambiguous Provision of a Federal Statute.

A. The Board's rules must comply with the Administrative Procedure Act.

The Board's authority is circumscribed by statute as follows:

> "The Board shall have authority from time to time to make, amend and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."
>
> Title 29, U.S.C.A. §156.

It is significant to note that this section was amended in 1947 to specifically require that such rules should be promulgated in the manner prescribed by the Administrative Procedure Act. The foregoing act originally became

effective September 11, 1946, and was last amended in 1966. (Historical note to Title 5, U.S.C.A. §551).

The Board relied heavily if not solely, on the case of *Securities Exchange Commission* v. *Chenery Corp.*, 317 U.S. 80, 63 S.Ct. 454, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 affirmed. A review of this case indicates the initial proceedings took place in 1943 at a time when there was no Administrative Procedure Act in the federal statutes. The court in *Chenery* decided the case on general principles of administrative law without reference to the Act. The Board's reliance on *Chenery* therefore is misplaced and in error.

The Administrative Procedure Act was first construed by this court in the case of *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950). The court made the following statement:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process *as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones against arbitrary official encroachment on private rights.*
>
> "Thus §3(a) of the Act requires every agency to which it applies—to publish in the Federal Register certain statements of its rules, organization and procedure, including the nature and requirements of all formal or informal procedures available, and adds that, 'No person shall in any manner be required to resort to organization or procedure not so published.' In addition, §6(b) proscribes any requirement of a report or other investigative demand 'in any manner or for any purpose except as authorized by law.'"

* * *

"Have the respondents been ordered to comply with procedure of which they were not put on notice by publication in the Federal Register? And to the extent that the procedure had been defined and published was it authorized by law?"

The court then went on to find that the Federal Trade Commission had properly published the particular rule in question and further that it had the statutory authority to promulgate such a rule. It is significant to note that the *Chenery* case was not cited in the *Morton* case.

A review of the recently reported cases indicates this court has not had occasion to again squarely review and construe the publication requirement contained in the Administrative Procedure Act. The court will no doubt review the Act as applied to the National Labor Relations Board in *Wyman-Gordon.*

It is significant to note that the court in *Morton* did not engage in a discussion of the rule making process and the adjudicatory process mentioned in *Chenery.* In fact, the Administrative Procedure Act contains its own definition of a "rule" and "rule making" which must be applied to this proceeding.

"(4) 'Rule' means the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret or prescribe law or policy or describing the organization, *procedure or practice* requirements of an agency;

"(5) 'Rule Making' means agency process for formulating, amending or repealing a rule;

"(6) 'Order' means the whole or a part of a final disposition whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing;

"(7) 'Adjudication' means agency process for the formulation of an order."

Title 5, U.S.C.A. §551.

After publishing the foregoing definitions, the act further provides:

"Each agency shall separately state and currently publish in the Federal Register for the guidance of the public,

* * *

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by each agency.

"(E) except to the extent that a person has actual and timely notice of the terms thereof, a *person may not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published.*"

Title 5, U.S.C.A. §552.

* * *

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."

Title 5, U.S.C.A. §553.

An inspection of these unambiguous statutes discloses a congressional mandate directing governmental agencies

to proceed in an orderly and judicial manner in accordance with published rules.

In *Hotch* v. *United States*, 212 F.2d 280, the court held:

> *"The Administrative Procedure Act and the Federal Register Act require publication irrespective of actual notice as a prerequisite to issuance of regulation—.*
>
> "While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The acts set up the procedure which must be followed in order for agency rulings to be given the force of law. *Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued and consequently it is ineffective.*
>
> * * *
>
> "We quote from the Report of the House of Representatives Committee on the Judiciary in its statement on the substance of the Administrative Procedure Act:
>
> > " 'In the "rule making" (that is, "legislative") function, it [the Administrative Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations.*' U. S. Code Congressional Service 79th Congress, Second Session, 1946, p. 1195 at 1205."

The Board has admitted in this proceeding that in adopting the *Excelsior* Rule it was "promulgating a rule, i.e., a policy declaration of general applicability". It will be noted, however, that whereas an adjudication was made in the *Excelsior* case, the rule was not applied to the parties in that proceeding.

In *Wyman-Gordon Company* v. *N.L.R.B.*, 397 F.2d 394, the court made this observation:

> "In *Excelsior* however the Board did not decide a case between party and party, or, more exactly it decided a case one way and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. *The Board has chosen to disregard Congress.*"

The Board, in reality, is contending that the Administrative Procedure Act does not apply to its rule making procedures. Thus the Board, unfettered by any federal statute regulating its activities, can fashion substantive rules having the force of law, including penal sanction, on an ad hoc basis, prospectively or retroactively. Such a method of administration runs counter to our traditional legal concepts and the Administrative Procedure Act.

> "Congress provided no exception in the Administrative Procedure Act for rules improperly promulgated * * *. To recognize such exception would be to emasculate the statute."
>
> *Wyman-Gordon Co.* v. *NLRB*, supra.

In the dissenting opinion in the *Wyman-Gordon* case, Judge Coffman makes a distinction between substantive and procedural rules. Thus the argument is made that the Board's procedural rules need not be published in the Federal Register. Surely such a rule as the *Excelsior* Rule, which can be enforced by subpoena and possible jail sentence, affects the substantive rights of the employer.

The Board has cited Title 5, U.S.C.A. §553(a) as authority for exempting the Board from compliance with the Administrative Procedure Act. This section of the Act concerns the "general notice of proposed rule making shall be

published in the Federal Register." The exceptions noted above are prefaced by the following statement:

> "Except *when notice or hearing is required by statute this subsection does not apply* (A) to rules of procedure * * *."

This section deals with the public rule making authority of the Board which it has seldom chosen to invoke. See Peck, *The Atrophied Rule Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729 (1961), 1 Davis, *Administrative Law*, §6.13.

In short, it is the employer's contention the Board may proceed by general rule or by adjudication but in either case there must be a publication of a substantive rule in the Federal Register to give the rule validity. Any other construction ignores the intent of Congress in enacting the Administrative Procedure Act.

The court's attention is also directed to the fact that the Board in this case combined the *Excelsior* Rule with the Board's rule relative to a showing of interest. The Board's rule relative to a showing of interest reads as follows:

> "* * * The evidence of representation submitted by the petitioning labor organization * * * is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's adminstrative experience that * * * the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30% of the employees * * *." 29 C.F.R. §101.18.

If the employer had not instituted this action, it would have been served with a subpoena and ultimately a complaint for mandatory injunction whereby the company would be compelled to supply information to the Board concerning the *union's showing of interest*. Under the Board's

rules, no representation proceedings are to be held unless there has been an adequate showing of interest. Thus a Board ad hoc ruling having the force of law, can be used in the course of a representation proceeding, to aid and perfect the union's organizational campaign even though the union's initial efforts to obtain a showing of interest has failed. It is submitted that the Administrative Procedure Act was enacted to prevent such a subversion of the National Labor Management Relations Act of 1947.

The Board in this case relied upon *NLRB* v. *Beech-Nut Life Savers, Inc.*, ... F.2d ....., Case No. 32002, Second Circuit, December 3, 1968, as further authority in support of the *Excelsior* Rule. The court in the foregoing case relied principally on *Chenery* to reach the conclusion that the *Excelsior* Rule was properly promulgated. Thus the Board was privileged to proceed either by "quasi-legislative" promulgation of general rules or in "quasi-judicial" proceedings when the problem arises as an issue in a case before the Board. *The court chose to ignore the requirements of the Administrative Procedure Act relative to publication in the Federal Register.* In short, the *Beech-Nut Life Savers, Inc.*, case does not answer the arguments made in *Wyman-Gordon.*

B. The Board's Excelsior Rule does not seek evidence touching the matter under investigation and therefore is not authorized by Title 29, U.S.C.A. §161(2).

The Board claims that irrespective of any issue existing in a representation case, it has the right pursuant to the above statute to issue a subpoena requiring the employer to produce a list of its employees' names and addresses to be made available to all parties to the proceeding. That such a list constitutes "evidence" is indeed distorting congressional intent in enacting Title 29, U.S.C.A. §161(2) of Labor Management Relations Act of 1947.

"Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acceptation, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."

31 C.J.S., *Evidence*, §2;

Accord: *NLRB* v. *Sun Shipbuilding & Dry D. Co.*, 135 F.2d 15, 25 (3d Cir. 1943);

NLRB v. *Bell Oil & Gas Co.*, 98 F.2d 870, 871 (5th Cir. 1938);

3 Wigmore on *Evidence*, Vol. 1, §1.

In *NLRB* v. *Montgomery Ward & Co., Inc.*, 64 LRRM 2061, and *NLRB* v. *Q-T Shoe Mfg. Co.*, 279 F.Supp. 1, the court applied the traditional definition of "evidence" and denied enforcement of the *Excelsior* Rule. In *NLRB* v. *Hanes Hosiery Division*, 384 F.2d 188, cert. denied 390 U.S. 950, ... S.Ct. ....., ... L.Ed.2d ....., the court, in a two page opinion, summarily sustained the *Excelsior* Rule application holding that the names and addresses of the employees constituted "evidence" of a matter under investigation. The opinion cited only one case as authority, namely *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 (1940). This case held generally that the control of details of an election were matters entrusted to the Board. This is not to say that the Board has unlimited power over the conduct of an election. *Leedom* v. *Kyme*, supra.

The Supreme Court's denial of certiorari in the *Hanes Hosiery* case does not reflect the court's views as to the merits of the case. The court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the

bar has been told many times." *United States* v. *Carver*, 260 U.S. 482, 490 (1923), *Sunal* v. *Large*, 332 U.S. 174, 181 (1947).

Hanes Hosiery and its progeny, *NLRB* v. *Rohlen*, 385 F.2d 52, and *NLRB* v. *Beech Nut Life Savers, Inc.*, supra, proceed from the premise that the *Excelsior* Rule is a good rule; using voter registration lists as an analogy. The rationalization is then made that such lists constitute "evidence" which can be obtained by subpoena. Ultimately the full power of the United States District Court can be brought to bear against the employer for a failure to disclose such "evidence" to the union.

It is an elementary rule of law that,

> "The lists of registered voters are *public records* and are open to reasonable inspection by the *public* * * *."
>
> 29 C.J.S., *Elections*, §50, p. 124.

In contrast:

> "The use of a person's name without his consent may constitute an unwarranted invasion of his right of privacy * * *."
>
> 77 C.J.S. §5, p. 409.

The foregoing cases further ignore the fact that the Board had an adequate published rule on the subject of checking the list of eligible voters' names prior to an election. See 29 C.F.R §101.19. The *Excelsior* Rule goes far beyond the mere checking of eligible voters before an election. It places the names and home addresses in the hands of the union up to 30 days prior to an election as the Board demanded in this case.

No party will question the Board's authority to determine the identity of the eligible voters in a Board supervised election. It is quite another matter when the

Board hands a list of names and home addresses over to a union for the obvious purpose of the solicitation of union votes.

C. The Excelsior Rule violates plaintiff's employees' right to refrain from union organization.

Section 7 of the National Labor Relations Act, 29 U.S.C.A. §157, guarantees to employees the right to organize and also the right to refrain from organizing:

> "Employees shall have the right to self-organization, to form, join, or assert labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection, and *shall also have the right to refrain* from any or all of such activities * * *." (Emphasis supplied).

In the instant case the plaintiff sent each of its employees eligible to vote an authorization to sign if they desired to have their names and addresses disclosed to the Board and union. Three employees out of the 319 to whom authorizations were sent exercised their Section 7 rights by signing the authorization to furnish their names and addresses to the Board and union. The remaining 316 employees exercised their Section 7 rights to refrain from any such activity by refraining from furnishing their names and addresses to the Board and the union. By so refraining, each employee unequivocally manifested his desire to be free from personal visits by persistent union organizers, repeated telephone calls and repeated mailings by union organizers.

The Board has a duty to protect these important employee rights.

> "Individual rank-and-file employees, caught in the toils of selfish complexities of honest company-union

negotiations, are entitled to look to the Board for protection of their rights."

Shoreline Enterprises of America v. *NLRB*, 262 F.2d 933, 946 (5th Cir. 1959).

The Board in the instant case, contrary to the admonition in *Shoreline Enterprises*, supra, has disregarded the employees' clearly expressed desires to avoid these intrusions. Thus, the Board has effectively nullified the intent of Congress in enacting Section 7 of the National Labor Relations Act.

There has been no showing in this case that the union does not have access to the company's employees through the usual methods of imparting information. Many of the company's terminals are located in small cities. Further the company has offered to furnish names and addresses to a disinterested person.

"The Act requires that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. *It does not require that the employer permit the use of its facilities for organization when other means are readily available.*"

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 679, 76 S.Ct. 679, ... L.Ed. ....., Affirming 222 F.2d 316 (5 Cir.).

Enforcement of the *Excelsior* Rule forces the employer to utilize its time and property for the purpose of aiding the union in its organizational efforts. Surely the giant labor organizations in this country are now in a position to carry on their internal affairs without governmental assistance.

D. The Excelsior Rule violates plaintiff's employees' constitutional right to free association and privacy.

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958), the Supreme Court carefully considered the constitutional rights of members of a group to keep their identity and addresses secret.

> "We think that the production order (for the names of the members of the N.A.A.C.P. in Alabama) . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." (357 U.S. at 462, 78 S.Ct. at 1172).

The list in the *Alabama* case was to be furnished to the Alabama Attorney General, a governmental official. Here, the defendant seeks to furnish the list of the Teamsters Union, a private organization.

The court also held that the N.A.A.C.P. could properly assert the constitutional rights of its members:

> "We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this court. In so concluding, we reject respondents' argument that the Association lacks standing to assert here constitutional rights pertaining to the members who are not of course parties to the litigation." (357 U.S. at 458-459, 78 S.Ct. at 1170).

Surely, plaintiff's nexus with its employees is as close as that of the N.A.A.C.P. and its members. This constitutional right to freedom of association was codified in Section 7 of the National Labor Relations Act, discussed above, guaranteeing employees the right to refrain from organizational activities.

The *Excelsior* Rule further invites the invasion of employees' constitutionally protected right of privacy. The Supreme Court has recently held that:

> "The Fourth and Fifth Amendments were described in *Boyd* v. *U. S.*, 116 U.S. 616, 630, . . . as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U.S. 643, 656, . . . to the Fourth Amendment as creating a 'right to privacy no less important than any other right carefully and particularly reserved to the people.' "
>
> *Griswold* v. *State of Connecticut*, 381 U.S. 479, 484-485, 85 S.Ct. 1678, 1681-1682 (1965).

The right of private citizens to be free from invasions into their private lives is also protected by another line of authorities. These decisions uphold the constitutionality of municipal ordinances which prohibit door to door canvassing where the resident has not previously manifested his consent to be called upon. These decisions also hold that the constitutional right of the resident to be left alone outweighs the constitutional rights of outsiders to communicate with him in his home. *Breard* v. *City of Alexandria, La.*, 341 U.S. 622, 71 S.Ct. 920 (1951); *Green River* v. *Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933).

The courts that have upheld the *Excelsior* Rule have chosen to ignore the foregoing decisions. These courts are simply saying that where the right of privacy conflicts with a labor organization's right to engage in collective bargaining, the individual's right of privacy must be subordinated to the right of the labor organization.

E. The United States District Court in this case had inherent jurisdiction to enjoin Acts of a Federal Administration Agency in excess of the Agency's statutory authority.

"The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902. This recognition of the jurisdiction of the federal courts has carried through a long line of cases to the present time. As a corollary of that doctrine, it has long been recognized that a federal court, upon complaint of an injured party, has jurisdiction to compel administrative action wrongfully withheld in violation of a statutory duty to act."

Deering Milliken, Inc. v. *Johnston,* 295 F.2d 856, 861 (4th Cir. 1961);

Marbury v. *Madison,* 5 U.S. 137 (1803);

U. S. v. *Interstate Commerce Commission,* 337 U.S. 426 (1949);

Heikkila v. *Barber,* 345 U.S. 229 (1953);

Harmon v. *Brucker,* 355 U.S. 579 (1958);

Schilling v. *Rogers,* 363 U.S. 666 (1960).

Finally, it must be emphasized that all that is necessary for the valid exercise of this court's jurisdiction is a finding that the Board is acting contrary to an express statutory provision of the Act. *Miami Newspaper Printing Pressmen's Union, Local 46* v. *McCulloch,* supra, at 997. Moreover, Board orders are also reviewable by federal courts where Board action results in a denial of a constitutional right. *Fay* v. *Douds,* 172 F.2d 720 (2d Cir. 1949); 51A C.J.S., *Labor Relations,* §653.

II

The Court of Appeals Was Guilty of an Abuse of Discretion in Disposing of This Case in a Summary Fashion.

The Rules of the United States Court of Appeals for the Fifth Circuit at the time this case was submitted made no provision for the summary disposition of appeals. The appellate court relied solely upon Rule 2 of the Federal Rules of Appellate Procedure as a source of this authority. The rule provides:

Rule 2

Suspension of Rules

> "In the interest of expediting decision or for other good cause shown a court of appeals may except as otherwise provided in Rule 26(b) suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

The Advisory Committee's Note concerning this rule reads as follows:

> "The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants *by prescribing a time schedule other than that provided by the rules.* The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26 (b) prohibits a court of appeals from extending the time for taking appeal or seeking review."

Petitioner will concede that under Rule 2 the court's briefing schedule can be shortened to comply with the exigencies in a particular case. The appellate court, however, in this instance expanded the rule to foreclose the

employer's right to be heard in the same manner as other litigants before the court.

As a matter of general law,

> "It has been broadly stated that every litigant has a constitutional right to have his case reviewed in the Appellate Courts."
>
> 4 C.J.S., *Appeal and Error*, Sec. 1, p. 65.

This Court has held

> "The duty of the Court of Appeals and the Supreme Court . . . *cannot ordinarily be discharged summarily.*"
>
> *Mario Mercado E. Hijos* v. *Commins*, 322 U.S. 465, 64 S.Ct. 1118, ... L.Ed. .....

The summary disposition of cases greatly enhances the possibility of error which could be avoided if the litigants have been given a full opportunity to be heard. Thus the court in this case cited *Howell Refining Co.* v. *NLRB*, 5 Cir., ... F.2d ....., as disposing of the case on the merits. A close analysis of this case indicates that whereas the *Excelsior* Rule was challenged, none of the issues argued in *Wyman-Gordon* were presented to the court by the litigants in *Howell*.

The court further cited a dissenting opinion of this court in *Coppedge* v. *United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21, in support of its contention that

> "the appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judge, time or administrative efficiency in judicial output by a traditional submission with all the trappings."

The majority opinion in the above cited case stated clearly:

> "We hold petitioner has not yet received the benefits of presenting either *oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court.*" At 82 S.Ct. p. 925.

The court further cited its local Rule 10 in support of its authority to summarily dispose of litigation on the merits. Rule 10 reads as follows:

> Unless otherwise ordered by the Court, no motion shall be orally argued. (For other provisions regarding motions, see Rule 27 FRAP.)

Such a rule contemplates procedural orders and not a summary adjudication on the merits of the appeal.

Petitioner concedes that Rule 2 of the Federal Rules of Civil Procedure is a broad grant of judicial authority, authorizing the various courts of appeals to formulate rules applicable to summary proceedings. The First, Third and Tenth Circuits have specific rules covering summary proceedings. Thus, a litigant can determine whether his case is docketed on a regular calendar or a summary calendar. In the instant proceeding the petitioner did not have formal notice by rule or other legal notice that this case would be placed on a summary calendar for disposition without oral argument and full briefs on the merits.

In the event the court grants certiorari in this case, petitioner urges the court to judicially construe and clarify the newly enacted Rule 2.

CONCLUSION

The company in this case offered to deliver the names and addresses of its employees to a disinterested third party who would not disclose the names and addresses of the employees but who would on request mail communications from the union to such employees. The com-

pany further offered to comply with the Board's prior rule where the names and addresses were retained by the Board for its confidential use. The Board refused to accept either offer and gave notice of its intention to enforce its *Excelsior* Rule. Under such circumstances, the company instituted this action to test the validity of the Board's *Excelsior* Rule. The company urges the court to review and consider the arguments made herein and avoid the erroneous rationalizations made in support of the *Excelsior* Rule. If Congress is convinced of the wisdom of the rule, then let Congress enact appropriate legislation on this subject. The Labor Management Relations Act does not authorize proceeding in a unilateral fashion to invoke a rule without a hearing and without compliance with the Administrative Procedure Act.

> "The authority of an administrative agency to make rules is not the power to make law."
>
> *American Broadcasting Co.* v. *U. S.*, 110 F.Supp. 374, Affirmed, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699.

The *Excelsior* Rule is essentially legislation compelling an employer to assist an international union in its organizational efforts under penalty of imprisonment. For the foregoing reasons, the court is urged to grant this petition for a writ of certiorari.

Respectfully submitted,

.....

PAYNE RATNER
444 North Market
Wichita, Kansas
JOE H. TONAHILL
Tonahill Building
Jasper, Texas
Attorneys for Groendyke Transport, Inc.

APPENDIX A

Opinion of United States District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GROENDYKE TRANSPORT, INC.
vs.
ELMER DAVIS, Regional Director, 16th Region, National Labor Relations Board
vs.
SOUTHERN CONFERENCE OF TEAMSTERS, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Civil No. 5998

HONORABLE PAYNE H. RATNER, JR.
Ratner, Mattox, Ratner, Ratner & Barnes
444 North Market Street
Wichita, Kansas 67201

HONORABLE JOE H. TONAHILL
Tonahill Building
Jasper, Texas 75951
For the Plaintiff

HONORABLE EVERT P. RHEA
National Labor Relations Board
Sixteenth Region
819 Taylor Street
Fort Worth, Texas 76102
For the Defendant

On the 12th day of July, 1968, this matter came on for hearing upon proper notice to defendant, on the veri-

fied complaint of the plaintiff moving for a preliminary and permanent injunction against the defendant enjoining him, in his capacity as Regional Director, from conducting an election pursuant to the terms of the decision and direction of election issued by the National Labor Relations Board dated June 5, 1968, and from conducting any administrative hearings on June 28, 1968, seeking enforcement of the terms of the subpoena duces tecum issued by The National Labor Relations Board on June 21, 1968, directing plaintiff's Vice-President and Secretary to appear before defendant on the 28th day of June, 1968, and produce certain records and documents, and further from commencing any legal proceedings in any court of the United States for the purpose of enforcing the aforementioned subpoena duces tecum.

Plaintiff is represented by Payne Ratner and Joe H. Tonahill; defendant is represented by Evert P. Rhea, General Attorney, National Labor Relations Board; intervenor is represented by L.N.D. Wells, Jr.

The Court, after reviewing the verified complaint and briefs of the plaintiff, the motions of the defendant to dissolve the temporary restraining order and to dismiss the complaint and the memorandum brief in support thereof, and after reviewing the intervenor's motion to intervene and to dismiss the complaint, and after hearing the stipulations and arguments of counsel and being fully advised in the premises, makes the following findings:

FINDINGS OF FACT

1.

Plaintiff is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the

National Labor Relations Act (29 U.S.C. Sec. 152(6) and (7)), referred to hereafter as the "Act".

2.

Defendant is the Regional Director of the Sixteenth Region of the National Labor Relations Board, hereafter called the "Board", created by the Act (29 U.S.C. Sec. 151, et seq.) and empowered and directed to administer the provisions of the Act, including the investigation of questions of employee representation under Section 9 (29 U.S.C. Sec. 159).

3.

On June 6, 1967, the intervenor filed two certification petitions with the Board's Sixteenth Regional office at Fort Worth, Texas, asserting its claim to represent plaintiff's truck drivers and shop employees in Oklahoma and Texas respectively and seeking a representation election to establish its majority support among those employees.

4.

The proceedings instituted by the petition are known on the records of the Board as Case No. 16-RC-4660 and 16-RC-4661, consolidated cases.

5.

On August 5, 1967, during the hearings in the certification proceedings, the Board issued a subpoena duces tecum directing plaintiff's Vice-President and Secretary to appear before the Board's Hearing Officer on September 12, 1967, and produce plaintiff's original payroll records showing plaintiff's employees at each of its terminals in Texas and Oklahoma, their classifications and wages.

6.

Upon plaintiff's refusal to comply with said subpoena duces tecum, the Board on relation of intervenor herein, instituted enforcement proceedings under Section 11 of the Act (29 U.S.C. Sec. 161) in the United States District Court for the Western District of Oklahoma, Civil Action No. 67-359. The judgment in that case modified the Board subpoena to the extent of ordering that plaintiff's employees' names need not be produced or disclosed.

7.

On June 5, 1968, the Board issued a Decision and Direction of Election finding that each of plaintiff's terminals in Oklahoma, Texas and Louisiana is an appropriate unit for bargaining within the meaning of Section 9 of the Act (29 U.S.C. Sec. 159) and directing elections to be held for each unit. As a part of its direction of election, the Board ordered plaintiff to file a list of its employees' names and addresses, eligible to vote, with the defendant within seven days of June 5, 1968. Said order was made pursuant to a rule adpoted by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 on February 4, 1966. Pursuant to this rule, the list of names and addresses would be furnished to the intervenor.

8.

Plaintiff timely filed a motion to modify the direction of election by offering to submit the list to a disinterested third party who would mail union correspondence to plaintiff's employees upon the union's request but who would not disclose the names and addresses to the union. Plaintiff's motion was overruled by the Board by a teletype order dated June 11, 1968.

9.

On June 21, 1968, the Board issued a subpoena duces tecum to plaintiff's Vice-President and Secretary, Robert McKennon, directing him to appear before defendant on June 28, 1968, and produce corporate records of plaintiff reflecting the names of plaintiff's truck driver employees at its terminals in Oklahoma, Texas and Louisiana or in lieu thereof, a list of the names of plaintiff's truck driver employees in the aforementioned terminals.

10.

On June 13, 1968, plaintiff's President mailed authorizations to each of its truck driver employees in Oklahoma, Texas and Louisiana, requesting the employees to authorize plaintiff to divulge their names and other personal data to the union if ordered by the Board. Three employees out of the 319 to whom said authorizations were mailed signed the authorizations. The remaining 316 refrained from so authorizing. The 3 out of 319 comprised less than one per cent of said involved employees.

11.

Intervenor has an interest in this case because its rights under Section 9 of the Act may be affected should the Court grant the relief prayed for by plaintiff.

12

Plaintiff has no adequate remedy at law except in this action because it has no other legal means under its control to test the validity and enforceability of the Excelsior rule. Defendant's acts, unless enjoined, will deny plaintiff's rights under the National Labor Relations Act and the Fifth Amendment to the Constitution of the United States.

13.

Upon inquiry from the Bench, the parties advise the Court that they have no additional evidence to present in support or in opposition to the complaint for a permanent injunction.

CONCLUSIONS OF LAW

1.

Intervenor's motion to intervene herein is sustained.

2.

The Court has jurisdiction of the parties and the subject matter of this action pursuant to Section 24(8) of the Judicial Code (28 U.S.C. Sec. 1337) and the United States Supreme Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

3.

The Board's Excelsior rule, adopted in *Excelsior Underwear, Inc.*, 156 NLRB 1236, was adopted in violation of Section 6 of the Act (29 U.S.C. Sec. 156) and in violation of Sections 2 and 3 of the Administrative Procedure Act (5 U.S.C. Sections 552, 553). For this reason the Excelsior rule is unenforceable. *Wyman Gordon Company* v. *N.L.R.B.*, 68 LRRM 2483 (1st Cir. June 12, 1968).

4.

The Court therefore ORDERS, ADJUDGES and DECREES that the subpoena heretofore issued by the Board on June 21, 1968, in its proceedings entitled Case No. 16-RC-4660 and 16-RC-4661, be and it is hereby ENJOINED.

5.

It is further ORDERED that the defendant, in his capacity of Regional Director, is permanently enjoined from instituting enforcement proceedings under 29 U.S.C. Sec. 161 in any United States Federal District Court seeking enforcement of a Board subpoena duces tecum ordering production of the names and addresses of plaintiff's employees pursuant to footnote 10 of the Board's Direction of Election, dated June 5, 1968; and only such subpoena sought on the authority of the *Excelsior Rule* in furtherance of an election is permanently enjoined.

6.

It is further ORDERED that plaintiff's request in its complaint for a preliminary and permanent injunction enjoining elections in the aforementioned certification proceedings is hereby DENIED and the Court's temporary restraining order restraining such elections is hereby DISSOLVED.

ENTERED this 1st day of August, A.D., 1968.

.....

United States District Judge

APPENDIX B

Judgment of United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26812

GROENDYKE TRANSPORT, INC.,
Appellee,

v.

ELMER DAVIS, Regional Director, 16th Region,
National Labor Relations Board,
Appellant,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

(January 2, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge

BROWN, Chief Judge:

This case raises two questions, the first, perhaps more important than the second, concerns the method by which we determine the cause. The second, more traditional, goes to the merits. We conclude that expedited disposition by summary proceedings on briefs but without oral argument is called for and proper. To the merits our answer is reversal of the Trial Court's Decree as an unwarranted intrusion into the domain of the Board.

I.

This case comes to us on a motion of the NLRB to summarily reverse an order of the District Court enjoining enforcement of an *Excelsior*[1] order issued by the Board directing Groendyke Transport Co., the Employer, to furnish to the Regional Director a list of the names and addresses of all employees in units eligible to participate in the Board-ordered election. The Employer opposes summary disposition.[2]

On June 5, 1968, the Board issued a Decision and Direction of Election in Board Case No. 16-RC-4660 and 4661 directing the Regional Director to conduct elections among certain units of Employer's employees. Pursuant to the rule announced in Excelsior Underwear, Inc., 1966, 156 NLRB No. 111, the Board, in its Decision and Direction of Election, ordered Employer to submit to the Regional Director a list of the names and addresses of its employees in each unit eligible in the elections.

The Employer refused to produce the list as directed. Consequently, on June 24, 1968, the Regional Office served on it a subpoena *duces tecum* for the information requested.

The Employer did not move to revoke the subpoena, as it is entitled to do under Sec. 11(1) of the Act and Sec. 102.66(c) of the Board's rules (29 C.F.R. Sec. 102.66

1. Excelsior Underwear, Inc., 156 NLRB No. 111, 1966 CCH NLRB Par. 20, 180.

2. So strenuous is Employer's objection that in its responsive opposition it invokes FRAP Rule 35, Local Fifth Circuit Rule 12 to suggest *hearing* en banc, on the Court's power to dispose of the case summarily. But no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the petition for hearing en banc is DENIED.

(c)). Rather, on June 26, 1968, the Employer filed a complaint in the Court below seeking to enjoin the Regional Director from conducting the elections as directed by the Board, and permanently to enjoin the Regional Director from initiating proceedings in any Federal Court to enforce the subpoena *duces tecum* or otherwise to seek to enforce the Board's *Excelsior* requirement.

On July 5, the Regional Director filed a motion to dismiss the complaint on the grounds that the Court lacked jurisdiction over the subject matter of the action and the complaint failed to state a claim upon which relief can be granted.

After a hearing on July 12, the Court below, on August 1, issued its decision denying the Regional Director's motion to dismiss and enjoining him from enforcing or attempting to enforce the Board's *Excelsior* rule against the Employer. Relying on the decision of the First Circuit in Wyman-Gordon Co. v. N.L.R.B., 1 Cir., 1968, 397 F.2d 394, *cert. granted,* ..... U.S. ....., ... S.Ct. ....., ... L.Ed.2d ..... (37 U.S.L.W. 3177), the Court below found that the *Excelsior* rule is unenforceable and void because it was issued in violation of §§ 2 and 3 of the Administrative Procedure Act (5 U.S.C.A. §§ 552, 553). The Court below therefore concluded that it had jurisdiction over the subject matter of the action under Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210, that the subpoena issued by the Board against the Employer should be enjoined, and that the Regional Director be permanently enjoined from seeking to enforce any Board subpoena ordering the production of the names and addresses of the Employer's employees as required by the Board's *Excelsior* rule and the Decision and Direction of Election issued on June 5, 1968.

II.

The Employer challenges vigorously this Court's power under FRAP Rule 2[3] to summarily dispose of the appeal. Besides the suggestion of en banc determination of that question (see note 2 *supra*) it also moved for oral argument on the Board's motion for summary reversal. The motion was considered without oral argument in accordance with the long tradition of this Court. See Local Fifth Circuit Rule 10(c). Its argument almost demolishes FRAP Rule 2 by the broad assertion that the Rules having the force of a statute[4] assure to litigants the regular (at a sometime-leisurely pace) procedure for filing of a printed record (or appendix), the preparation and filing of regular briefs, and the submission with oral argument when, and as, the Court with its schedule can calendar the case either routinely or specially.[5]

At a time in which courts are everywhere importuned to exhaust fully all imaginative resources of judicial inventiveness,[6] it would be an amazing thing to read FRAP

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3. Rule 2 provides: "In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

Rule 26(b) refers to time in which notice of appeal must be given.

4. See the Enabling Act. 28 U.S.C.A. §§ 2071, 2075. See also 1949 U.S. Code Cong. & Ad. News at 1248.

5. The applicable rules are: Briefs, Rule 28; Appendix to the Briefs, Rule 30; Filing and Service of Briefs, Rule 31; and Oral Argument, Rule 34. Experience has demonstrated that if the time schedule provided for by the rules were followed the case would not be ripe for calendaring for approximately 180 days from the date the appeal is taken from the decision of the District Court.

6. See, *e.g.* the annual remarks of the Chief Justice to the American Law Institute in Bros., Inc. v. W. E. Grace Mfg. Co., 5 Cir., 1965, 351 F.2d 208, 209 n. 1, *cert. denied*, 1966, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852; Peters v. Rutledge, 5 Cir., 1968,

Rule 2 as a new, narrow restriction on the power of the Courts of Appeals to gear themselves to the exigencies of today's complex legal problems, procedural and substantive, and to the demands of administrative judicial productivity. The Rule—set out perhaps purposefully at the very beginning—recognizes the need for special handling and the parallel existence of power. The usual thing is for submission with oral argument. But when the case is judicially determined not to warrant or require that usual process the Court, consistent with a fair opportunity to the parties to advance and counter arguments and contentions, can and should prescribe the method of submission and disposition.

We can think of at least two circumstances under which summary disposition is necessary and proper. Both of them appear in this case. The first comprises those cases where time is truly of the essence. This includes situations where important public policy issues are involved or those where rights delayed are rights denied. Second, are those in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous. Without canvassing all other possible or likely situations, we hold that where either of these circumstances is found, summary disposition is proper.

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397 F.2d 731, 738 n. 22; Jackson v. Choate, 5 Cir., 1968, ____ F.2d ____ (Misc. No. 1071, Nov. 29, 1968); Jackson v. The Dept. of Pub. Welfare of Fla., S.D. Fla., 1968, ____ F. Supp. ____, n. 1 (No. 68-568-CIV-EC, Dec. ____, 1968). This problem is developed at length with detailed data concerning the Fifth Circuit in the Senate Report of Hearings on the Operation of Procedures for the Temporary Assignment of Federal Judges, 1968, before the Subcommittee on Improvements in Judicial Machinery, 90th Cong., 2d Sess., at 64-80 (1968); testimony and statement of the Chief Judge with supporting exhibits, Crisis in Courts of Appeals, at 80-84 (1968); and remarks of Senator Tydings, Chairman, October 8, 1968, 114 Cong. Rec. S. 12237-39.

As with the demands of statutes and rules, nothing in the constitutional concept of due process forbids special, summary disposition without all of the marks of a traditional submission. Parties are normally assured a "hearing" but that term does not demand that the communication be oral and audible. By long practice, and frequently by express rules,[7] important substantive or procedural issues are fully and finally disposed of by the highest of tribunals wholly on written papers without oral argument of any kind. The requisites of that portion of due process described as "hearing" are satisfied by providing the parties with the opportunity of affirmatively advancing argument with supporting authority and a like opportunity for response and counter-argument by the adversary. This may be done by briefs without oral argument. Oral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee. Indeed, the practice of Courts of disposing of cases in a variety of situations on the papers, reflects the experience of mature judges that oral argument in many, many cases adds nothing to the process of enlightenment. In these times of exploded and exploding[8] dockets every proper effort must be made to allow Courts to hear and decide more cases more expeditiously. Indeed, the due process and equality so cherished is denied by the very process of nominally treating all cases alike. Thus, every time a frivolous appeal or one in which there is a practical certainty how it must be decided is calendared and argued orally, some other litigant with a meritorious appeal, presenting serious questions of law for consideration

7. Perhaps most notable is that of the statutory appeal as a matter of right from 3-Judge District Courts to the Supreme Court. See 28 U.S.C.A. § 1253. The great bulk of these cases are disposed of by the jurisdictional statement and motion to dismiss or affirm as prescribed by Supreme Court Rules 13 and 16.

8. See note 6 supra.

by the Court, is deprived of his place at the bar. And it seldom is any answer to say that relief to such postponed litigant should come by expedited special settings. It isn't long until nearly all are preference cases.

When a case is frivolous or its outcome so certain as a practical matter the appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judge-time or administrative efficiency in judicial output by a traditional submission with all the trappings.[9]

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9. Although the problem there is whether the appellate court is ever to give any consideration to the asserted merits, cases dealing with allowance of appeals in forma pauperis, 28 U.S.C.A. § 1915, or the similar one of granting a certificate of probable cause in a habeas appeal, 28 U.S.C.A. § 2253 shed some light on when a "hearing" is required. See, *e.g.*, Coppedge v. United States, 1961, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed. 2d 21. "Upon such presentation the Court of Appeals found itself satisfied that petitioner's conviction was proper. It is true that no oral argument was permitted. However, having come to the conclusion that the case had no merit, the Court had to put a stop to the review proceeding. This is true whether the appeal is paid or non-paid. * * * We adjudicate most of our appeals in the same manner, i.e., by dismissing or affirming on the briefs without argument. Inasmuch as the case had arisen within the procedural confines of appeals in forma pauperis, the Court of Appeals simply denied leave to appeal. It could have granted leave to proceed and then summarily affirmed or dismissed the appeal under Rule 39(a), Fed. Rules Crim. Proc." Dissent, 369 U.S. at 461, 82 S. Ct. at ——, 8 L.Ed. 2d at 37.

See also United States v. Johnson, 1946, 327 U.S. 106, —— S.Ct. ——, 90 L.Ed. 562 "Rule IV gives the Circuit Court of Appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. * * * Under that Rule the Circuit Court of Appeals here, after studying the issues raised, and upon determining that the only objection was to the Trial Court's findings on conflicting evidence, should have decided that this does not present the reviewable issue of law and on its own motion have dismissed the appeal as frivolous." 327 U.S. at 113, —— S.Ct. at ——, 90 L.Ed. at 566; Nowakowski v. Maroney, 1967, 386 U.S. 542, 87 S.Ct. 1197, 18 L.Ed.2d 282; and Carafas v. LaVallee, 1968, —— U.S. ——, —— S.Ct. ——, 20 L.Ed.2d 554, 561: "Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate a basis for the Court's summary action."

We therefore find more than ample authority for summary disposition by the Court on its own motion or that of a party. Having determined that we have the power, we summarily reverse. The fact that we term this a "summary" reversal does not imply that the legal question presented was not thoroughly considered on its merits.[10]

III.

The merits may be disposed of quickly. The injunction was issued on August 1, 1968, and has prohibited the Board from going ahead with the representation proceeding. Instead of a prompt resolution of the question whether a majority of Employer's employees in the designated plants desire to be represented by the petitioning union, this litigation has caused delay and uncertainty. It amounts to an unwarranted intrusion into matters committed to the Board with a frustrating effect on a statutory mechanism that is to be swift and subject to minimal judicial scrutiny and then only under precise circumstances. Court interference suspends or burdens the election process.[11]

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10. The motion for summary reversal was filed in this court on October 9, 1968. From that date until the date of this opinion, the parties have been free to file, and have filed extensive motions, briefs, reply briefs, and supplemental briefs bringing us up to date on the grant of certiorari in *Wyman*, and the Second Circuit's recent *Excelsior* decision, *post* Part III. Indeed, they have taken full advantage of this more than eight-week period and have thoroughly expressed their views.

11. In a reply memorandum the Employer suggests there is now no urgency for expedited action since elections have been held (half were lost by the Union) at ten of the terminals. The Board informs us, however, that the Regional Director has recommended invalidating such elections for failure to comply with *Excelsior*.

This sequential controversy dramatizes the disruptive effect of court intrusion.

This Court has spoken clearly on need for speed and the limited review of representation proceedings. "(C)ertification orders are normally reviewable only when the Board petitions a court of appeals for enforcement of an order to bargain entered pursuant to section 8(a)(5). The reason for severely circumscribing court interference in representation matters is to avoid dilatory tactics which would postpone the commencement of bargaining when the employer really had no substantial objections to the conduct of the election other than a desire to delay bargaining as long as possible."

"In a similar vein, the federal courts have restricted the use of their equity powers to restrain representation proceedings to three very narrow situations. One exceptional set of circumstances is presented where the suit tenders 'public questions particularly high in the scale of our national interest because of their international complexion.' McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed. 2d 547, 552 (1963). Another exception, which has been fashioned primarily by the Second Circuit, comes into play where there is a substantial showing that the Board action has violated the constitutional rights of the complaining party. See Fay v. Douds (2 Cir. 1949) 172 F.2d 720. The third exception, on which the appellee relies strongly, is predicated on the Supreme Court's decision in Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). There the court upheld a district court injunction setting aside a Board election and certification where the Board had clearly acted 'in excess of its delegated powers and contrary to a specific prohibition in the Act.' The courts have generally interpreted *Kyne* as sanctioning the use of injunctive powers only in a very narrow situation in which there is a 'plain' violation of an unambiguous and

mandatory provision of the statute." Boire v. Miami Herald Pub. Co., 5 Cir., 1965, 343 F.2d 17, 20-21.

The Supreme Court is likewise clear. "(I)n the normal course of events Board orders in certification proceedings under § 9(c) are not directly reviewable in the courts. This Court held as long ago as American Federation of Labor v. Labor Board, 308 U.S. 401, 84 L.Ed. 347, 60 S.Ct. 300, that the 'final order(s)' made reviewable by §§ 10(e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, § 9(d) of the Act makes full provision for judicial review of the underlying certification order by providing that 'such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed' in the Court of Appeals." Boire v. Greyhound Corp., 1964, 376 U.S. 473, 477, 84 S.Ct. 894, ..., 11 L.Ed.2d 849, 852-53.

The District Court erroneously relied on Wyman-Gordon Co. v. NLRB, 1 Cir., 1968, 397 F.2d 494, *cert. granted,* ..... U.S. ....., ... S.Ct. ....., ... L.Ed.2d ..... (37 U.S.L.W. 3177) since this Court later specifically approved the *Excelsior* rule in Howell Refining Co. v. NLRB, 5 Cir., 1968, ... F.2d ..... (No. 24802, August 12, 1968). Judge Gewin said this for the Court: "We find the Rule to be a valid exercise of the Board's power to insure employees a fair and free choice in the selection of their representative." ..... F.2d at ..... (Slip opinion at 7-8).

Contrary to Employer's assertion this was not dicta. The *Excelsior* rule was specifically attacked. This Court took note of the First Circuit's decision and in passing upon the validity of *Excelsior* rejected *Wyman-Gordon*. We are bound by *Howell* and without reservation we may also say that it is right.

We are not alone. The Fourth Circuit has also approved the Rule in N.L.R.B. v. Hanes Hosiery, 4 Cir., 1967, 384 F.2d 188, *cert. denied*, 1968, 390 U.S. 950, ... S.Ct. ....., ... L.Ed.2d ..... And more recently the Second Circuit in a comprehensive analysis of all facets of the attack on *Excelsior* rejects each and all to uphold it without equivocation. N.L.R.B. v. Beech-Nut Life Savers, Inc., 2 Cir., 1968, ... F.2d ..... (No. 32002, Dec. 3, 1968).

We are undaunted by the grant of certiorari in *Wyman-Gordon*. Conceding the uncertainty of forecasting a jury verdict or an appellate decision, we see no portent of imminent mortality to *Howell*. But in any event the Supreme Court has made abundantly clear that Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 is to be narrowly construed. Boire v. Greyhound Corp., 1964, 376 U.S. 473, 481, 84 S.Ct. 894, ... 11 L.Ed. 2d 849, 854-55. And we have given vitality to the policy of court non-interference[12] in *RC* cases except in the three circumscribed situations discussed in Boire v. Miami Herald Publishing Co., *supra*. None of these exists here.

The injunction was unwarranted and must be vacated without delay to permit Board processes to go on.

REVERSED AND REMANDED.[13]

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12. Bokat v. Tidewater Equip. Co., 5 Cir., 1966, 363 F.2d 687.

13. The mandate shall issue immediately. Its effective date will be deferred for 10 days from its date to permit Employer to seek a stay from the Circuit Justice, the Supreme Court or a Justice thereof. 28 U.S.C.A. § 2101 (f).

APPENDIX C

Title 5, U.S.C.A., Sec. 551

"For the purpose of this subchapter—

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) 'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) 'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as

of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law of policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) 'rule making' means agency process for formulating, amending, or repealing a rule;

(6) 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) 'adjudication' means agency process for the formulation of an order;

(8) 'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) 'licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) 'sanction' includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action.

(11) 'relief' includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) 'agency proceeding' means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

APPENDIX D

Title 5, U.S.C.A., Sec. 552

"(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

APPENDIX E

Title 5, U.S.C.A., Sec. 553

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

APPENDIX F

Title 29, U.S.C.A., Sec. 156

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

APPENDIX G

Title 29, U.S.C.A., Sec. 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

APPENDIX H

Title 29, U.S.C.A., Sec. 161 (2)

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof."

APPENDIX I

Title 29, C.F.R., Sec. 101.18

"(4) Whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute (29 U.S.C.A. Sec. 159) unless the petitioner has been designated by at least 30 percent of the employees."

APPENDIX J

Title 29, C.F.R., Sec. 101.19

"A Board agent arranges the details incident to the mechanics and conduct of the election. For example, he usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election shall be adequately publicized by the posting of official notices in the establishment whenever possible or in other places or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules."